IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 118 OF 2005

AND

INCOME TAX APPEAL NO. 119 OF 2005

WITH

APPELLATE SIDE WRIT PETITION NO. 3837 OF 2006

Dhariwal Industries Ltd. .. Appellants

V/s

The Assistant Commissioner of Income-Tax, Circle 2(3), Pune. .. Respondents

Mr.Soli Dastoor, Senior Advocate with Mr.Nitesh Joshi and Mr.A.K. Jasani for the Appellant.

Mr.Ashok Kotangale for the Respondent.

CORAM : H.L. GOKHALE & V.R. KINGAONKAR, JJ.

DATE : 24TH JULY 2006

P.C. :

1. Heard Mr.Dastoor, Senior Advocate for the Appellants and Mr.Kotangale for the Respondent.

2. In the two appeals before us, the Appellants are raising a question concerning the interpretation and application of Section 80-I of the Income Tax Act to the facts of these cases. Section 80-I(1) provides amongst

others that where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, a deduction from such profits and gains of an amount equal to 20% is permissible. Sub-section (2) of Section 80-I lays down certain qualifying conditions and sub-clause (iii) thereof provides that for getting the benefit, the industrial undertaking must be manufacturing or producing articles not being any article or things specified in the list in the Eleventh Schedule. The Appellants are manufacturers of gutka and Entry 2 to the Eleventh Schedule is as follows:-

> "2. Tobacco and tobacco preparations, such as, cigars and cheroots, cigarettes, biris, smoking mixtures or pipes and cigarettes, chewing tobacco and snuff."

3. These two appeals are concerning the assessment of the Appellants for the years 1994-95 and 1995-96. The Income Tax Appellate Tribunal has allowed the appeals of the Revenue concerning these two years by its order dated 20th July 2004 and thereby the Appellants are denied the benefit of this provision on the ground that gutka manufactured by them contains 6.2% tobacco. Hence these two appeals.

4. Mr.Dastoor, learned counsel appearing for the Appellants, has tendered in the writ petition an affidavit of one Mr.Vilas Panse, Chief Accountant of the Appellants, affirmed today. In that he has enclosed a notice of the Income Tax Appellate Tribunal, Pune Bench dated 7th July 2006 informing the Appellants that the matters concerning the assessment for the years 1993-94, 1997-98, 1998-99, 1999-00 and 2000-01 are being placed before a Special Bench. Those are matters wherein the same issue is involved. In the present case, under the impugned order, the Tribunal has differed from a view taken by a Bench of the Tribunal at Allahabad, which view has been confirmed by the Allahabad High Court and the SLP therefrom has been dismissed. It has therefore been the submissions of the Appellants earlier before the Tribunal also that it was necessary to refer the question arising out of the assessment of these two years to a Special Bench. The Tribunal did not accede to that request, but now that the matters concerning these other assessment years are referred to a larger Bench, Mr.Dastoor submits that it would be desirable that instead of these appeals being heard in this Court, it will be better that the impugned order be set aside and the appeals be revived and those appeals be directed to be heard along with I.T.A. Nos.203/96, 864/02, 865/02, 960/03 and 961/03 which are the appeals concerning the other years.

5. Mr.Kotangale for the Revenue submits that the impugned order under challenge is a correct order and no interference is called for. Even so, from the point of view of uniformity, it will be correct to adopt the course suggested by Mr.Dastoor. In the circumstances, we set aside the common order passed by the Tribunal dated 20th July 2004 in I.T.A. Nos.1182 of 1997 and 169 of 1998 for the assessment years 1994-95 and 1995-96. We make it clear that the order is being set aside only for the sake of uniformity and not on merits about which we express no opinion. These two appeals will stand restored to the file of the Income Tax Appellate Tribunal, Pune and will now be heard along with the above referred I.T.A. Nos.203/96, 864/02, 865/02, 960/03 and 961/03.

6. We may record that the Appellants have filed a further affidavit placing on record that the tax for these 2 years has been fully paid or adjusted. Mr.Dastoor makes a further statement that until all the connected appeals are decided by the Special Bench, the Appellants will not claim any refund.

7. Both these Appeals stand disposed of with the above order.

8. As far as Writ Petition No.3837 of 2006 is concerned, the Petitioners herein had applied for rectification of the above order dated 20th July 2004 under section 256(2) of the Income Tax Act. That application was rejected by the Tribunal by its order dated 20th July 2005. Inasmuch as the order dated 20th July 2004 is set aside and the appeals are restored to the file of the Income Tax Appellate Tribunal, Pune, the order dated 20th July 2005 declining rectification no longer survives. This petition is accordingly disposed of with this observation.

(H.L. GOKHALE, J.)

(V.R. KINGAONKAR, J.)